No. 2644

United States
Circuit Court of Appeals
For the Ninth Circuit.

MANEY BROTHERS & CO. (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), Appellants,

vs.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, PORTLAND WOOD PIPE COMPANY, SLICK BROS. CONSTRUCTION COMPANY, Limited, S. C. COMERFORD, E. D. FORD, A. G. BUTTERFIELD and R. C. McKINNEY, Appellees,

CRANE CREEK IRRIGATION DISTRICT and SUNNYSIDE IRRIGATION DISTRICT, Cross-Appellants,

vs.

MANEY BROTHERS & CO. (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), Cross-Appellees.

Petition for Rehearing

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

RICHARDS & HAGA and
McKEEN F. MORROW,
Solicitors for Petitioners and Appellants,
Residence: Boise, Idaho.

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Petition for Rehearing

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

To the Honorable The United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioners, Maney Bros. & Co., appellants in the above entitled cause, respectfully petition this Honorable Court to grant a rehearing in said cause

and your petitioners especially claim error in the decision filed herein in the following particulars:

1. The decision appears to stand without supporting authority and seems to be in direct conflict with other decisions of this Court and with all the authorities on the subject that we have been able to find. The Court erroneously assumed that appellants' mortgage imposed a burden upon the Crane Creek Irrigation Project which the buyer could not remove without departing from the contract of sale and we think it erroneously concluded that, such being the case, the purchaser could consort with the seller to defeat the mortgage by paying the purchase price to the seller in total disregard of the rights and equities of the mortgagee; whereas, under the authorities, if the mortgage exceeds the purchase price, the buyer may pay the purchase price to the mortgagee and compel specific performance of the contract of sale and release of the mortgage. In other words, the buyer has the aid of the Court for the enforcement of the contract of sale according to its terms, but that does not mean that he may wholly ignore the rights of the mortgagee and join with the seller to cheat him out of his security, his duties in this regard being no different where the mortgage exceeds the purchase price than where it is less. The decision in effect places the stamp of approval on practices and courses of dealing seemingly contrary alike to law, equity and sound business morals.

2. This Court erroneously assumed that the mortgage of appellants could not be satisfied or paid

through the medium of the bonds of the appellees, Crane Creek and Sunnyside Irrigation Districts when in fact the districts had the right to deposit their bonds to the par value of $75,000 and $50,000, respectively, obtain a release from the mortgage and require appellee, Crane Creek Irrigation Land and Power Co., to credit them with that amount on their contract of purchase, and it was their duty to make this deposit if they wished to free the project from the lien of appellants' mortgage.

3. This Court erroneously assumed that the bonds, provisions for the deposit of which to satisfy appellants' mortgage was made in paragraphs 1 and 2 of the covenants of said mortgage, were in addition to the purchase price of the project instead of being a part of such purchase price.

4. This Court erred in not holding in accordance with its decision in Crane Creek Irrigation District and Sunnyside Irrigation District vs. Portland Wood Pipe Co. et al., No. 2645, that the lien of appellants' mortgage attached to the irrigation system before the districts acquired it, and such lien being valid and subsisting, was not displaced or discharged by the attempted conveyances to the districts but remained as fully effective after such conveyances as before.

5. That the Court erred in not applying the same reasoning to appellants' mortgage that it did to the lien of appellee, Portland Wood Pipe Co., in Cause No. 2645.

6. That the Court erred in not holding that the districts were estopped by their resolutions recognizing the validity of the lien of appellants' mortgage to afterwards deny its validity or defend against its foreclosure.

7. That the Court erred in declining to pass upon the legality of the contracts of August 22, 1910, or the manner in which they were performed on the ground that conveyances pursuant to such contracts had been made, and appellants could not object, for the reason that if such contracts were illegal or were illegally executed, no rights could be based on them and the actual conveyances to the districts were made long after appellants' mortgage and any rights acquired under such conveyances were subject to those of appellants.

8. That the Court erred in not considering the fact that between the execution of the contract of August 22, 1910, and the first conveyance to the districts in the spring of 1913, without any notice to appellants and apparently subsequent to their mortgage, the interests of the irrigation districts in the project were increased from 57% to practically 70%, and appellants were at least entitled to a lien on this 13% interest conveyed to the districts in addition to that provided for in the original contract.

Your petitioners herein seek to show that the Court, while apparently conceding the contentions urged by them in their brief and at the argument of the cause, has placed its decision on grounds that

are wholly untenable, and that such decision is in direct conflict with the decision in the companion case of the Crane Creek Irrigation District et al., vs. Portland Wood Pipe Co. et al., No. 2645, which was decided by this Court against the contention of the Irrigation Districts.

ARGUMENT.

In its decision herein, this Court has abandoned the theory of relation advanced by the trial court, and in view of the number and the clearness of the authorities cited on this point in appellants' brief, this basis for the trial court's decision does not seem maintainable. This Court also very properly disregards the wholly impossible position urged by appellees Crane Creek and Sunnyside Irrigation Districts that the property of an irrigation district is not subject to mechanics' liens or mortgages, and therefore property acquired by such corporations is *ipso facto* divested of any liens that may have attached to it before such acquisition.

This Court's decision concedes that a vendor under an executory contract of sale may mortgage his interest but holds that he may not impose burdens on the property which cannot be removed by the purchaser without departing from the contract of purchase, and that here, as the districts were to pay for the system in bonds while appellants' mortgage was to be paid in money, the mortgage was an additional burden imposed on the districts. But this holding, which is the gist of the decision and upon which it

must stand or fall, entirely overlooks the fact that the mortgage was given by the Crane Creek Irrigation Land and Power Co. in payment for the construction of a part of the system that Company had agreed to convey by the contracts of August 22, 1910. It asserts that the mortgage could not be discharged or satisfied by a tender of Irrigation District bonds and dismisses the provisions of the mortgage for the release of the districts on the deposit with the trustee therein named of the sum of $75,000 par value bonds of the Sunnyside District and $50,000 par value of the bonds of the Crane Creek District with the airy assertion that "these were burdens which the parties to the mortgage could not lawfully impose on the Irrigation Districts".

The fundamental error in this holding is the baseless assumption that this $125,000 par value of District bonds was in addition to the purchase price of the project to be paid by the Districts to the Crane Creek Company, whereas these bonds were necessarily a part of such purchase price. The mortgage was given for construction work and the Crane Creek Company, which was to receive District bonds for the system constructed and conveyed by it, including the reservoir constructed by appellants, agreed with the contractor that the deposit of a certain amount of these same bonds with a trustee should entitle the Districts to a release from the mortgage. The only bonds of these Districts which the Crane Creek Company could have to deposit were the bonds received for the purchase price of the system, and they were

the only bonds issued or authorized to be issued by the Districts, and hence these bonds were necessarily a part of the purchase price.

These provisions for the deposit of bonds laid no additional burden whatever upon the Districts, because they were in a position to insist that bonds to the par value of $125,000 should be placed in the hands of the trustee for the purpose of releasing this mortgage upon their interest in the system, and that this amount be credited to them on the purchase price of the project. Instead of doing this, they chose to deliver the bonds unconditionally to the Crane Creek Company, notwithstanding the fact that they had full knowledge of appellants' mortgage and the provisions therein for the deposit of these bonds. These provisions are as follows (trans. pp. 37-38):

"1. The mortgagor shall have the right to carry out its contract with what is known as the Sunnyside Irrigation District, which contract bears date of August 22, 1910. *But the mortgagees shall not be required to release the lien of this indenture on any of the property herein described, or upon the property to be conveyed under said contract by the mortgagor to said Sunnyside Irrigation District, until there has been deposited,* as additional security for the indebtedness secured hereby, with F. F. Johnson, Cashier of the Boise City National Bank, of Boise, Idaho, as Trustee, *Seventy-five Thousand Dollars* ($75,000) *par value of the legally issued bonds of said irrigation district,* the legality of which said bonds shall first have been approved by the Supreme Court of

the State of Idaho. *But upon such bonds being delivered the mortgagees agree to fully release from the lien of this indenture the interest to be conveyed by the mortgagor under its said contract to said Sunnyside Irrigation District.*

"2. The mortgagor shall likewise have the right to carry out its contract with what is known as the Crane Creek Irrigation District, which contract bears date of August 22, 1910. But the mortgagees shall not be required to release the lien of this indenture on any of the property herein described, or upon the property to be conveyed under said contract by the mortgagor to said Crane Creek Irrigation District, until there has been deposited, as additional security for the indebtedness secured hereby, with F. F. Johnson, Cashier of the Boise City National Bank, of Boise, Idaho, as Trustee, Fifty Thousand Dollars ($50,000) par value, of the legally issued bonds of said Irrigation District, the legality of which said bonds shall have first been approved by the Supreme Court of the State of Idaho. *But upon such bonds being delivered the mortgagees agree to fully release from the lien of this indenture the interest to be conveyed by the mortgagor under its said contract to said Crane Creek Irrigation District.*" (Our italics.)

Appellants' mortgage was recorded in Washington County, Idaho, where the property is situated, on October 6, 1911 (paragraph 7 of appellees' answers, pp. 63, 78), a year and a half before any bonds were delivered to the Crane Creek Company, and both dis-

tricts had actual notice of the mortgage and its terms from the date of its execution (see testimony of Mr. Ford, tr. p. 166; testimony of Mr. Coulter, tr. pp. 159, 160).

The first delivery of bonds was made about April 30, 1913, amounting to $151,000 par value of Sunnyside District bonds and $99,000 par value of Crane Creek District bonds. Thereafter bonds were delivered from time to time on account of the construction of the system in accordance with estimates as appears from Mr. Coulter's testimony to the amount of $386,800 par value of Sunnyside bonds and $188,500 par value of the Crane Creek bonds. All of these bonds were delivered unconditionally to the Crane Creek Company in total disregard of the rights of the appellants and without any attempt to obtain a release from appellants' mortgage of the property being conveyed to the Districts.

There was certainly nothing in the provisions of the mortgage above set out that could be construed to impose an additional burden on the Districts, and if by utterly disregarding these plain provisions of which they had full notice, the Districts have acquired this property subject to liens, they only are to blame. The Crane Creek Irrigation Land and Power Company had contracted to construct the system and convey it to the Districts free from liens, and it was their plain duty to see that the company performed its contract. The Crane Creek Company did not do the construction work directly. It contracted for the reservoir system with appellants and

gave this mortgage in payment for the work done by them. It contracted for the distribution system with appellee, Slick Bros. Construction Company, and agreed to pay such appellee in money, and appellee Portland Wood Pipe Company furnished material on a contract with Slick Bros. Construction Company which also called for payment in money.

Appellants' claim, the claim of the Pipe Company and the other sub-contractors and materialmen were all for construction work, and it was the duty of the Districts in each case to see that the proceeds of the bonds turned over by them to the Crane Creek Company were paid to the contractor, sub-contractors and materialmen. Appellees, Slick Bros. Construction Co. and Portland Wood Pipe Co., had not agreed to accept bonds and hence the Districts had to see that they were paid out of the purchase price. The record in Cause No. 2645, Crane Creek Irrigation District and Sunnyside Irrigation District vs. Portland Wood Pipe Co., the companion case to the present one, shows that the Districts failed to see that the Pipe Company was paid, that it filed its lien and brought suit to foreclose, and both the learned District Judge and this Court have very properly held that the Districts acquired this property subject to the lien of the Pipe Company and that the price of its work being a part of the construction did not impose an additional burden on the Districts. But the Pipe Company had to be paid in money and the Districts had to rely on the Crane Creek Company's selling bonds to raise this money and discharging

the lien, while this was not the case as to appellants' mortgage, for appellants had bound themselves to accept bonds in satisfaction of their mortgage on the property constructed for and to be conveyed to the Districts.

All that the Districts had to do to secure this release was to deposit bonds to the par value of $125,000, which it appears from the record were of the market value of about $75,000 in the spring and summer of 1913 (tr. pp. 136-150) and charge the Crane Creek Company with a payment of $125,000 on account of the purchase price. They would thus have released their interests in the system from a $90,000 mortgage for the equivalent of $75,000 in money. Why was it not done? The record fails to explain. If the failure to pay for the material furnished by the Pipe Company in money leaves the Districts subject to a valid lien for such material, why does not the failure to deposit bonds for the release of appellants' mortgage leave the Districts equally subject to a lien? No adequate answer is found in the opinion herein, and we think the same rule must of necessity be applied in either case.

In fact it seems to us that appellants' case is conceded when this Court says that the vendor under an executory contract of sale holds the legal title as security for the purchase price, and the title so held may be conveyed or mortgaged. This principle is fully established by the authorities cited at pp. 41 to 58 of appellants' brief herein and need not be elabor-

ated upon, as those authorities are approved by this Court. But the interest of the vendor is strictly limited by this doctrine and a purchaser or encumbrancer of the vendor's interest takes only what he had to convey and that is his lien for the unpaid purchase price, whether it be in money or securities, or what not. The grantee of the vendor acquires only the vendor's interest and the purchaser can compel the grantee to convey to him on precisely the same terms as he could compel the original vendor, but he cannot disregard the rights of such grantee. Where the balance due on the contract is tendered to the grantee or encumbrancer from the original vendor, and he claims something more, it may well be said that the vendor cannot impair or restrict the rights of the purchaser or impose burdens upon his interest, but where the purchaser wilfully disregards the rights of the grantee or encumbrancer and pays the purchase price to the original vendor, it only causes confusion to say that additional burdens have been imposed. In such cases, it is the act of the purchaser in wilfully and wrongfully paying the original vendor who has transferred his interest and right to payment that imposes the burden.

If a vendor of property under such a contract grants his interest outright, the consideration, whether more or less than the unpaid price, is entirely immaterial to the purchaser. In either case, the original purchaser may get the property on payment of the balance due on his contract to such

grantee, whether that balance be more or less than the grantee paid, and the purchaser is not legally entitled to the property on any other terms. Where the vendor's interest has been mortgaged, the mortgagee, of course, is only entitled to the payment of his debt, and if the debt is less than the balance, then, of course, the remainder would go to the vendor; but if it is mortgaged for more than the balance due, the mortgagee cannot acquire any greater interest than his vendor had and so must release his mortgage on payment of the balance of the purchase price.

To illustrate: If A contracts to sell land to B for $10,000 and later conveys or mortgages the same property to C for $15,000, no additional burden is placed upon B. He can pay C the $10,000 and compel him to convey if he is a grantee, or to release his mortgage if he is a mortgagee because C stands in A's shoes and takes subject to B's equity. C only acquired what A had, and that was the legal title as security for the payment of $10,000, and when the $10,000 is paid to C, he must convey; or, if he has a mortgage, must release it. There is one thing, however, that B cannot do under such circumstances; he cannot pay A the $10,000 after notice of C's rights and take the property free from all claims of C. If he attempts to do so, he may have to pay for the property twice, not because C paid $5,000 more for A's interest than B owed upon it, but because B has disregarded C's right to have the payment of $10,000 made to him.

On this point, see Lamm vs. Armstrong, 95 Minn. 434, 111 Am. St. Rep. 479; Southern Bldg. etc. Assn. vs. Page, 46 W. Va. 302, 33 S. E. 336; Mutual Aid Society vs. Gashe, 56 O. St. 273, 46 N. E. 985; Ten Eick vs. Simpson, 1 Sandf. Ch. (N. Y.) 244; Laughlin vs. Northwestern Lbr. Co., 176 Fed. 772, 193 Fed. 367. In the case last cited it was said: "*In case of a transfer the vendor has no right to receive the money if the vendee knows of the conveyance. If he pays the vendor, he may have to pay again.*" These cases are discussed fully in appellants' brief, and other authorities are also cited.

In this connection it should be noted that all the bond deliveries by the Districts were made to the Crane Creek Company absolutely and without qualification and were in total disregard of the rights of appellants under their mortgage or of any claims or liens of materialmen or sub-contractors on the project (see testimony of Mr. Coulter, tr. pp. 160 to 164), and the Irrigation Districts had taken an indemnity bond for $100,000 with the Aetna Accident and Liability Co. as surety for the faithful performance of the contracts of August 22, 1910, including the turning over of this property free from liens. (See paragraph XXVII of Exhibit B, tr. p. 119; exhibit T, p. 122; exhibit S, p. 134; exhibit R, p. 138; testimony of Mr. Coulter, p. 161.) The action of the Districts in obtaining this bond shows clearly that they recognized the possibility of liens on the project, and their action in paying over their own bonds without any attempt to protect themselves

shows that they were apparently relying on this indemnity bond as full protection. The decision, however, renders the surety bond useless and serves to protect the surety as well as the parties who wilfully chose to disregard the mortgage.

The only authority cited by this Court in deciding the present case is the case of Voss vs. Waterloo Water Co., 163 Ind. 69, 66 L. R. A. 95, but it in no way passes upon any feature involved in the present case and certainly cannot be said to sustain the decision. There a city was indebted up to its constitutional limit, and it was held that the purchase from a water company of a plant subject to a bonded indebtedness of $20,000 would in effect increase the debt of the city by that amount and the carrying out of such contract was therefore enjoined. The contract itself contemplated an additional indebtedness, but here the bonds of the Districts had been voted and issued and appellants' mortgage could have been paid in bonds and the amount credited on the purchase price of the project, and it was the failure of the District officers to have these bonds deposited as provided in the mortgage that saddled the Districts with the property, subject to a lien which was valid and subsisting when they acquired it. Under these circumstances, neither the Districts nor their officers should now be allowed to urge their own neglect of duty in discharging this lien.

The decision of this Court in the Portland Wood Pipe Co. case, No. 2645, referred to above, shows clearly that the mere conveyance to the Districts does

not discharge liens already in existence, and that case is both controlling and conclusive and should be followed here. No distinction is drawn or attempted to be drawn between the two cases in the briefs, or in either of the opinions of the Court, and apparently the conflict between them has escaped the Court's attention. A reference to the brief of counsel for the Districts in this case shows that they contended their property was not subject to appellants' mortgage because it would not be subject to mechanics' liens, and they relied on the same reasoning and authorities to support their position in regard to appellants' mortgage that they relied upon in regard to the Pipe Company's lien. The only question in the Pipe Company case, as stated by this Court in its opinion, was whether the mechanics' lien having arisen as against the Crane Creek Company prior to the conveyances to the Districts, the property of the Districts could be held subject to a mechanics' lien, and this Court decided this question in the affirmative, a decision which is undoubtedly sound in principle and sustained by the authorities.

The case of Salem vs. Lane & Bodley Co., 189 Ill. 593, 60 N. E. 37, 82 Am. St. Rep., 481, quoted at length and with approval by this Court in the Pipe Company case, is the exact counterpart of that case and seems to be a decisive authority both as to the lien of the Pipe Company and the mortgage of appellants. In that case Reed & Co. contracted to furnish the city with an electric light plant to be paid for in bonds of the city or partly in bonds and the

balance in notes at the city's option. This plant was to be conveyed free and clear of incumbrances. It was erected on land purchased for Reed & Co. by one Marshall, who financed their construction. The Lane & Bodley Co., sometime after the contract between the city and Reed & Co., installed an engine in the plant under contract with Reed & Co., and the city council had notice of such installation and the amount due for it; thereafter Marshall conveyed the land to Reed & Co. and they tendered the plant to the city and after inspection it was accepted and conveyed to the city; and the city elected to issue and deliver its bonds to Reed & Co. for the full purchase price. The transaction was entirely executed but Lane & Bodley were not paid and they thereupon brought suit to foreclose their lien. In upholding this lien, the Court said:

> "The decree was not awarded on the theory the property thus held by the municipality for the use of the public—to enable the city to discharge its public functions—is within the purview of the mechanics' lien law and subject to be sold to discharge an indebtedness contracted by the city for material or labor used in the construction of the plant, but that the lien attached to the electric light plant before it became the property of the city, for the debt of the then owners, T. C. Reed and William Van Kirk, and that the city acquired the property subject to the lien. Reed and Van Kirk were parties defendant to the bill, and a personal money decree was entered against them and a decree *in rem* against the electric light plant. The decree was prosecuted

on behalf of the city only. *If the defendant in error corporation had perfected a lien against the plant while it was the property of an individual owner, the subsequent purchase of the plant by the city could not operate to deprive the lienor of the benefit of the statutory provisions for the enforcement of the lien by a forced sale of the property.* The decree is a personal money decree against Reed and Van Kirk, and for the sale of the electric light plant in default of payment of the decree debt. There is no decree against the city for the payment of any sum. The city cannot be required, by mandamus or any order or process of the Court, to pay the decree debt. It is not a decree debtor, but the owner of real property upon which the lien of the decree may operate if it does not pay the sum specified in the decree. It may voluntarily pay the amount necessary to remove the lien from the property, but there is no process or authority of law that may be invoked to coerce it to make payment. The lien is created by the statute, and the statute provides, as the mode of enforcement of the lien, the sale of the land on which the lien has attached. To deny to the plaintiff in error corporation the benefit of this mode of enforcing the decree is, in this case, to nullify the lien."

Then, after reviewing the facts, the Court continued:

"Reed, of the firm of Reed & Co., and for the firm, afterward acquired the legal title by deed from Marshall, and the lien attached also to the fee title thus acquired by Reed. Reed subsequently conveyed to the city, but the lien was in

no wise impaired by this change of ownership. *The city acquired no greater or better title than its grantor had. Nor did the transfer of the title to the city, as we have before seen, divest the defendant in error company of the lien in its favor, which attached to and encumbered the lands in the hands of Reed.* There was some testimony to prove the city contracted for the land from Wilson, but by far the greater weight of the proof is adverse to this position. The contract between the city and Reed & Co. did not contemplate the city should be entitled to receive the title to the premises on which the plant was to be built until it had accepted and paid for the plant. If it elected to pay in bonds of the city, the contract provided Reed & Co. should convey the property to the city on delivery of the bonds; but if the city should elect to pay for the plant in part in six notes, due, respectively, in one, two, three, four, five and six years, the contract expressly provided that Reed & Co. should convey to the city only 'when all of said notes, and interest thereon, are fully paid'. The city advanced no money to pay for the land, and an affirmative act of acceptance of the plant and payment thereof, as before mentioned, were prerequisites to the right of the city to demand any right or title to the premises. The substance of the entire transaction was, that Reed & Co. proffered to procure, construct and tender to the city a complete electric light plant (grounds, building and machinery), constructed in accordance with given specifications and plans, for a specified sum of money, and the city contracted to accept the said plant (grounds, building and machinery) if constructed and tendered

> in accordance with the terms of the proposition of said Reed & Co., and under the contract Reed & Co. tendered, and the city accepted, a plant which was encumbered by a legally subsisting lien in favor of the defendant in error company. *Such a lien would not be displaced by the conveyance to the city, but the lien remained as fully effective against the property after the conveyance to the city as before.*" (Our italics.)

In the case just quoted from, as in the Pipe Company case and the case at bar, the indebtedness was incurred by the vendor of the property under an executory contract of sale for the construction of that which he had agreed to convey. In all of them the vendor was to be paid in bonds of the municipal corporation buying the property, but only in the present case could the indebtedness and lien of the contractor be paid off in such bonds. In the Lane-Bodley case and in the Pipe Company case the contractor was entitled to payment in money. In all of these cases the property was constructed by the contractor and was subject to the mechanics' lien or the mortgage when the conveyances were made to the municipal corporation, and in all of them that corporation had notice of the claim. In none of the cases was a decree sought against the municipal corporation, but only against the property, so that the indebtedness was in each case a claim against the property only and not generally against the corporation. Notwithstanding the fact, however, that these cases are substantially identical, this Court has held that in the present case the conveyance of the system to the Ir-

rigation Districts discharged and displaced the mortgage of appellants while at practically the same time it held that such conveyances did not displace or discharge the lien of the Portland Wood Pipe Co. and approved the decision of the Illinois courts in the Lane & Bodley case. We think that the decision herein should have followed that in the other two cases.

The opinion in the Pipe Company case, Cause No. 2645, was written at the same time and by the same Judge as that in the case at bar, though not filed until March 20, 1916, and after stating that the sole issue in the case was whether the interest of the Districts could be subject to a mechanics' lien under the facts, the Court said:

> "The Court below did not find it necessary to determine whether the property of an irrigation district is subject to the lien laws of the State of Idaho, nor do we. For, conceding that an irrigation district is a public corporation, and that its property cannot be subjected to a lien for material furnished to the district direct or to a contractor with the district, *yet when an irrigation district or other public corporation acquires property from another it acquires it subject to all liens and burdens lawfully imposed upon it by the former owner just the same as any other purchaser.* In the present case the Irrigation and Power Company was in possession of the irrigation system as owner and was holding itself out to the world as such. It contracted for the construction of an irrigation system on its own property and material was furnished to be used in that system

for which a lien was given by the laws of the state. *That lien attached before the Irrigation District acquired the property and was not displaced by the conveyance to the district.*" (Our italics.)

In the same way the Crane Creek Irrigation Land and Power Company while in possession of this irrigation system contracted for the construction of the reservoir on its own property and gave a mortgage on all its property in payment for such work. This it might lawfully do both as to property which it then owned or property which it might thereafter acquire under the laws of Idaho, and as stated by this Court in its opinion herein, as the vendor of property under a contract of sale on which nothing had been paid it could lawfully mortgage its entire interest.

We have shown above that the mortgage contained an express provision whereby it could be released without necessitating a departure from the contract of purchase, and hence no burden was placed upon the property by this mortgage. It was therefore a burden "lawfully imposed" upon the property by the Crane Creek Company and the lien of such mortgage attached "before the Irrigation Districts acquired the property and was not displaced by the conveyance to the Districts."

In concluding its opinion in the Pipe Company case, after quoting at length from the case of Salem vs. Lane & Bodley, this Court says:

"While on grounds of public policy the property of municipal corporations held for public

> purposes may be exempt from the operation of the general lien laws of the state, yet such municipalities may not enter into contracts with third persons for the construction of plants or other improvements on the property of such third persons to be thereafter conveyed to the municipality and then claim the statutory exemption from liens for labor performed upon or materials used in the construction of the contemplated improvements."

Every word of this quotation applies with equal force to the mortgage of appellants, and we submit that no sound or valid distinction can be made between the cases and that the decision in the lien case should be followed here. In fact, this Court does not attempt to distinguish the two cases and by implication disapproves the attempts of the trial court to distinguish them, and the law upon the subject is thus left in a state of confusion. The most marked difference between the two cases is that the mechanics' lien must necessarily be paid in money, whereas the Districts could have secured a release from the mortgage in bonds. In the first case, they had to rely upon the Crane Creek Company carrying out its contract obligations, while in the latter they could have themselves deposited the bonds with the trustee named in the mortgage and required the Crane Creek Company to credit them with that amount on the purchase price. This difference makes appellants' case even clearer than that of the lien claimant.

It may be suggested that the difference arises from the fact that the mechanics' lien of the Pipe Company is created by statute and entitled to some special consideration but no valid distinction can be based upon this ground. The mortgage lien of appellants, it is true, arose directly from the contract of the vendor Crane Creek Company for the construction of one portion of this irrigation system, while the mechanics' lien of the Pipe Company arose indirectly from the contract of the Crane Creek Company as vendor for the construction of another part of the system. Appellants contracted directly for their lien while the lien statute gave the Pipe Company a lien by reason of its contract, but in the same sense the general principles of equity and the statutes of Idaho gave a lien upon present and future acquired property to a person who takes a mortgage on such property, and the lien of a mortgage created by act of the parties directly is certainly entitled to as much consideration as a mechanics' lien arising indirectly from such a contract.

The trial Court and this Court concede that appellants have and still have a valid and subsisting lien by mortgage on the interest of the Crane Creek Company in this project, and this lien of necessity vested so far as any of the property was then in existence when the mortgage was made in September, 1911. At that time not a dollar's worth of consideration had passed from the Districts. They had no equity in the system whatever but merely a contract for purchase when it should have been constructed. The

reservoir site and rights of way were already in existence and the lien of the mortgage vested at that time. No work was ever done on the reservoir by anyone but appellants and that work was all finished before anything was paid by the Districts. The particular structures constituting the distribution system, as the flumes, pipe lines, etc., became appurtenant to the rights of way as they were constructed, and the lien of appellants' mortgage attached to the structures as built. The Districts only paid for them upon monthly estimates and necessarily the work had already been done and the structures completed before these estimates were given. The conveyances also were based on these estimates, and hence as to every portion of the system the conveyances were all subsequent to the attaching of the mortgage of appellants.

In order, therefore, to sustain the decision of this Court herein, it is necessary to hold without qualification that a conveyance of property to an irrigation district subject to a valid and subsisting mortgage lien divests such mortgage lien. We have already shown that the cases of Crane Creek District vs. Portland Wood Pipe Co., No. 2645, in this Court, and Salem vs. Lane & Bodley Co., 189 Ill. 593, 82 Am. St. Rep. 481, hold clearly that mechanics' liens are not divested by such conveyances and the authorities show that the same rule must be applied to mortgages.

Thus, in Fidelity Trust and Guaranty Co. vs. Fowler Water Co., 113 Fed. 560, the plaintiff brought

action to foreclose a trust deed on the property of a waterworks company which had been conveyed to the town of Fowler and the town was made a party defendant. The town had passed an ordinance granting the waterworks company a franchise in the city, agreeing to pay a certain sum annually as hydrant rentals and agreeing that the company might mortgage its property and franchises. This ordinance also reserved to the town an option to purchase the property. The ordinance was accepted by the company which built the plant and mortgaged all its property to complainant and later the town exercised its option and the plant was conveyed to it, the conveyance reciting that the town did not assume the mortgage debt. The town was indebted to its constitutional limit and the question was the validity of the indebtedness as against it. The Court held (1) that the purchase by the town subject to the incumbrance created an indebtedness of the town to the full extent of such incumbrance, (2) that the option to purchase did not invalidate the ordinance, (3) that its exercise though illegal did not invalidate the contract to pay hydrant rentals, and (4) that the conveyance to the town was illegal but the mortgage was nevertheless valid as against the town. The Court said, at page 571:

> "It is difficult to see how a contract valid and enforceable before the exercise of the option to buy can be rendered invalid by the unlawful act of the town in attempting to purchase. The bondholders had the right to assume that the town would exercise the option to buy in good faith,

and would not attempt to do so when it knew the constitution prohibited it from making a lawful purchase. It may be that, as between the town and the water company, the conveyance would not be set aside by a Court of equity, at the suit of the water company, on the ground that each party was in *pari delicto*. The complainant and the bondholders, however, are in nowise implicated in the unlawful act, *and they have a right to have the conveyance of the waterworks adjudged illegal.* The town of Fowler can claim no advantage or benefit, as against the complainant and the bondholders, by reason of its receiving a conveyance of the waterworks pursuant to the option reserved in the ordinance.

"The title of the waterworks stands of record in the town of Fowler. The town is in the actual possession of the tangible property covered by the deed of trust. It is therefore, not only a necessary, but an indispensable, party to a suit for the foreclosure of the trust deed. A decree of foreclosure against the water company alone would not enable the purchaser at the foreclosure sale to obtain possession of the waterworks without further litigation against the town. The complainant was therefore under a necessity to make the town of Fowler a party defendant to the bill to procure an effective decree of foreclosure; and in such case it is according to the established course of procedure, in order to avoid multiplicity of suits and to prevent expense and delay to the parties, to proceed and give such final relief as the circumstances of the case may demand."

This decision has been quoted with approval in several cases and was followed in effect by Judge

Van Fleet in Wykes vs. City Water Co., 184 Fed. 752, and by this Court in the same case on appeal, City of Santa Cruz vs. Wykes, 120 C. C. A. 485, 202 Fed. 357, where the foreclosure of a similar bond issue was upheld. In the latter case, this Court points out clearly the difference between the action of a municipality in its governmental capacity and in its proprietary or quasi-private relations, and this distinction applies more forcibly to irrigation districts which exercise governmental functions only in regard to the levy and collection of assessments than it does to cities. The nature of such corporations is thus defined by the Supreme Court of Idaho in the case of Nampa and Meridian Irrigation Dist. vs. Briggs, 27 Ida. 84, 147 Pac. 75, where the Court says of an irrigation district:

> "It is a mutual co-operative corporation organized not for profit, engaged in distributing water to its members for use upon land within its district."

The effect of conveyances to irrigation districts has also been passed upon by the Supreme Court of Idaho, in Knowles vs. New Sweden Irri. Dist., 16 Ida. 217, 225; 101 Pac. 81, where the Court says:

> "The canal company could not sell any greater title than it possessed and when the irrigation district purchased, *it could neither purchase nor acquire any greater title or interest than its grantor owned and possessed. When it purchased this canal system, it purchased it subject to and burdened with the rights and equities of the appellant's grantor.*" (Our italics.)

In City of Nampa vs. Nampa & Meridian Irrigation District, 19 Ida. 779, 787, 115 Pac. 979, the Court states:

> "The question arises: Does the defendant, as an irrigation district, stand in any different situation from its predecessor? We think not. An irrigation district is a public quasi corporation, organized, however, to conduct a business for the private benefit of the owners of land within its limits. They are the members of the corporation, control its affairs, and they alone are benefited by its operations. It is, in the administration of its business, the owner of its system in a proprietary rather than a public capacity, and must assume and bear the burdens of proprietary ownership. In the case at bar it has simply purchased the system of the Boise City Irrigation & Land Co., and it acquired in the streets of the City of Nampa only such rights as its predecessor had."

See also:

Smith vs. Faris-Kesl Co., 27 Ida. 407, 150 Pac. 25.

In the case at bar, if it be true, as this Court seems to have thought from its reference to the case of Voss vs. Waterloo Water Co., 163 Ind. 69, that the irrigation districts could not legally acquire title to this system subject to incumbrances, the necessary result is not that the lien of appellants' mortgage is divested but that the attempted conveyances to the Districts are invalid. This Court seems to assume, however, that the Districts by wilfully disregarding the provisions for release of the mortgage and obtaining illegal conveyances have divested the lien of ap-

pellants' mortgage, but this is as much as to say that any valid lien by mortgage on real property may be divested by the artifice of the mortgagor conveying the property to a municipal corporation which has no power to mortgage its property. The mere statement of such a proposition is its own refutation, and yet this Court apparently without realizing what its decision amounts to when reduced to its essence has done that very thing.

We think we have shown with sufficient clearness that the mortgage to appellants executed in payment of construction work included in the contract between the Crane Creek Company and the Districts and expressly made payable in bonds of the District to the extent of their interests, imposed no burden upon them which could not be discharged in accordance with the terms of their contract of purchase, that the Districts paid the Crane Creek Company with knowledge of appellants' rights, and therefore at their peril, and that the case of Crane Creek and Sunnyside Irrigation Districts vs. Portland Wood Pipe Co. argued with the case at bar and decided at the same time with it was correctly decided and should be followed in this case. If we are correct on these points, we submit a rehearing should be granted, but there are several other points in the opinion which require attention.

The Court refers in its opinion to the resolutions adopted by the Districts in the summer of 1914 as "so manifestly *ultra vires* that it calls for no discussion," but at this time no conveyances from the com-

pany to the Districts were of record and appellants had no knowledge that any such conveyances had been made. The District officers by their formal action on these resolutions obtained a delay of nearly six months in the institution of proceedings for the foreclosure of appellants' mortgage, during which time additional bond deliveries were made to the Crane Creek Company, and the settlement referred to in the opinion of the trial Court (tr. p. 183) was reached with the principal contractor, under which bonds and other securities which had been delivered to the Crane Creek Company were placed in the hands of a trustee for disbursement to various creditors of the project. This completely refutes the Court's theory that these resolutions were without consideration, and inasmuch as the Districts in this matter were acting in their proprietary capacity, we think the doctrine of estoppel should be applied.

In the case of City of Santa Cruz vs. Wykes, *supra*, this Court applied the doctrine of estoppel as against the city in a case of this kind, and we think that within the rule of this case the action of the Districts in recognizing the validity of this mortgage was not *ultra vires* in the sense that the transaction was absolutely and unalterably void, but, having received the benefit of appellants' inaction by a delay of several months in instituting foreclosure proceedings during which time they were able to effect a settlement with Slick Bros. Construction Co., the principal contractor under which that company lost its lien on the project, they will not now be permitted to disavow or abrogate their liability.

This Court also declines to pass upon the alleged illegality in the contracts of August 22, 1910, and the manner in which the District bonds were paid to the Crane Creek Irrigation Land and Power Co. under such contracts and the amendments thereto. This action is based upon the theory that these contracts have been executed and the mortgagors are not in a position to challenge or question what has been accomplished; but if the contracts are illegal or were executed in an illegal manner, then clearly the Districts must base their rights in every portion of this system which they claim solely upon the attempted conveyances, of which the deed set out at pp. 168-172 of the transcript is an example. As we have already pointed out, both the trial Court and this Court have held that appellants had a valid and subsisting lien on the interest of the Crane Creek Company in this project, and that this lien vested and attached to the various portions of the system prior to any of these conveyances. If these contracts are illegal, the District's rights must rest solely on the subsequent conveyances, and there is no legal basis whatever for holding that the conveyances take precedence over the prior mortgage. The authorities on these points are discussed sufficiently in appellants' brief (pp. 60-77), to which we beg leave to refer.

In this connection we wish again to call attention to the fact urged at the hearing and in our brief but apparently overlooked by the Court, that the conveyances from the Crane Creek Irrigation Land and Power Co. to the Sunnyside and Crane Creek Irriga-

tion Districts are not based upon the percentages shown by the contracts of August 22, 1910. Under these contracts the Sunnyside District was to have a 35.26% interest in the system, and the Crane Creek District a 21.75% interest (trans. pp. 101, 121). The deed (trans. p. 168) shows that the interest actually conveyed to the Sunnyside District was 47.2% of the system, and an examination of the other deeds, all of which are on file in this Court as original exhibits numbered 1 to 13 for each District, shows that all the conveyances to the Sunnyside District were in this proportion, while the conveyances to the Crane Creek District were all for a 22.4% interest. This matter is explained by Mr. Coulter at p. 150 of the transcript, where he says: "Since the execution of said two contracts of August 22nd, additional acreage has been added to each of said Districts, and the percentages called for in that contract are not the correct percentages." He does not state the date of this change, but it was without any notice to appellants and apparently subsequent to the date of their mortgage. This change seriously prejudices the rights of appellants, if it is to be finally held that their mortgage lien upon the Districts' property is lost by means of the conveyances, because when they took the mortgage the Crane Creek Company had a 43% interest in the system, and on this at least it is conceded that their mortgage has always been valid. Subsequently and without any notice to them, nearly 13% of this system is taken out from under their mortgage and

conveyed to the Districts. Surely it cannot be held that vested rights may be so disregarded. In this connection it may be well to point out also that paragraph 8 of the decree (tr. p. 210) so qualifies and limits the rights of appellants and the Crane Creek Company in the reservoir system as to make the mortgage security which is apparently left to appellants wholly valueless.

Wherefore, your petitioners respectfully submit that a rehearing should be granted in this cause, for this Court has erroneously assumed that appellants' mortgage was an additional burden placed upon the contract of purchase by the vendor, and that it could not be paid off by the Districts in their bonds and a proportionate reduction on the purchase price of the system made, and because this Court should have followed the decision in the case of Crane Creek Irrigation District et al. vs. Portland Wood Pipe Co., No. 2645.

Respectfully submitted,
RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Petitioners.

State of Idaho,
County of Ada,—ss.

I, Oliver O. Haga, of counsel for petitioners above named, do hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

OLIVER O. HAGA,
Solicitor and of Counsel for
Petitioners Maney Bros. & Co.